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No. 811

In the
Supreme Court of the United States
OCTOBER TERM, 1968

JOSEPHINE MISKUNAS,
Petitioner,

vs.

UNION CARBIDE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable The Supreme Court of The United States:

Your Petitioner, Josephine Miskunas, respectfully prays that a writ of certiorari issue to review and reverse the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on July 8, 1968, as to which rehearing was denied on September 10, 1968; and in support of her petition, Petitioner represents as follows:

I.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit was filed July 8, 1968. It is reported at 399 F.2d 847. A verbatim copy is found in the Appendix hereto (page 1a).

On July 23, 1968, Petitioner (Plaintiff-Appellant) filed her Petition for Rehearing by the Court In Banc.

On July 24, 1968, the Court of Appeals directed Respondent (Defendant-Appellee) to file an Answer to the Petition for Rehearing. This was done on August 5, 1968.

On September 10, 1968, the Court of Appeals denied Petitioner's (Plaintiff-Appellant's) Petition for Rehearing by the Count In Banc. There was no written opinion; a verbatim copy of the Order is found in the Appendix hereto (page 13a).

II.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1) and Rule 19(b) of the Rules of this Court, to:

(A) Reverse the judgment of the United States Court of Appeals for the Seventh Circuit, which Court has by its judgment herein decided an important question of federal law which has not been, but should be, explicitly settled by this Court, and has done so in a way in conflict with applicable decisions of this Court.

(B) Resolve a conflict between the decision of the United States of Appeals for the Seventh Circuit in this case and the decisions of the United States Court of Ap-

peals for the Second Circuit in *Igneri* v. *Cie. de Transports Oceaniques* (2 Cir., 1963), 323 F.2d 257, *cert. den.* 376 U.S. 949 and the District of Columbia Circuit in *Hitaffer* v. *Argonne Co.* (D.C. Cir., 1950), 183 F.2d 811, *cert. den.*, 340 U.S. 852, on the constitutional question in issue here.

(i) Date of Judgment Sought to Be Reviewed.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 8, 1968. Rehearing was denied on September 10, 1968 (Appendix, pages 1a to 12a and 13a, respectively).

(ii) Statutory Provision Conferring Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

III.

QUESTION PRESENTED FOR REVIEW.

Does the State of Indiana deny equal protection of the laws to a married woman by enforcement of a rule of law which holds that she may not recover civil damages for loss of her husband's consortium, while in situations otherwise identical Indiana law confers upon a married man the right to recover for loss of his wife's consortium?

IV.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in

> actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

V.

A CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED.

The case originated in the United States District Court for the Southern District of Indiana, Indianapolis Division, where it was filed by the plaintiff, now Petitioner, Josephine Miskunas. Her complaint is in four paragraphs or counts, each alleging in substance that she has lost her husband's society, comfort and companionship (*i.e.*, "consortium") as a proximate result of the torts of defendant (now Respondent) Union Carbide Corporation because, on July 14, 1966, her husband was severely injured in an industrial explosion at Respondent's plant in Kokomo, Indiana, where he was performing services for an independent contractor. (His personal action is still pending).

Jurisdiction of the District Court was invoked by reason of diversity of citizenship and the requisite amount in controversy. Petitioner (and her husband) are citizens of the State of Indiana. Respondent is a New York corporation admitted and qualified to do business in the State of Indiana.

On motion of defendant (Respondent), the District Court dismissed Petitioner's complaint in its entirety, holding that the law of the State of Indiana does not grant to a married woman the right to recover damages for loss of her husband's society, companionship and the other intangible interests collectively characterized as "consortium". The District Court relied upon two decisions of the Supreme Court of Indiana (*Brown* v. *Kistleman*, (1912), 177 Ind. 692, 98 N.E. 637 and *Boden* v. *Del-Mar Garage* (1932), 205 Ind. 59, 185 N.E. 860), gave some weight to an *obiter dictum* contained in another decision (*Burk* v. *Anderson* (1952) 232 Ind. 77, 109 N.E.2d 407), and alluded to an opinion of the Appellate Court of Indiana (*Miller* v. *Sparks* (1963), 136 Ind. App. 148, 189 N.E.2d 720).

The constitutional issue here presented, though raised and briefed in the District Court, was neither considered nor decided by that Court.

Thereafter, Petitioner brought her appeal to the United States Court of Appeals for the Seventh Circuit. There, a three-member panel affirmed the judgment of the District Court, one judge dissenting (Appendix, pages 6a to 12a). Petitioner's Petition for Rehearing by the Court In Banc was denied (Appendix, page 13a).

VI.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The substantive law of the State of Indiana may for present purposes be taken as denying to a married woman the rights Petitioner sued for in the District Court. Throughout the litigation the parties have agreed that the substantive law of the State of Indiana protects a husband's counterpart rights in respect to recovery of damages for loss of his wife's consortium.

By way of Respondent's briefs in the Court of Appeals, some confusion entered the case as to whether a wife's interest in preservation of her husband's consortium is identical to a husband's counterpart interest. The majority opinion of the Court of Appeals resolved that question in Petitioner's favor (as, of course, did the dissenting opinion). Any doubts concerning the identity of consortium interests will be resolved upon review of the careful opinion of the Court of Appeals of the State of New York in *Millington* v. *Eastern Elevator Co., Inc.,* decided July 2, 1968, reported in full at 239 N.E.2d 897.

Recovery was denied by the Court of Appeals for the Seventh Circuit in the instant case upon the narrow and entirely speculative groun. that effectuation of the Equal Protection Clause might "result in a double recovery." The thrust of this rationale rests upon some questionable statistics somehow thought to make an otherwise irrational classification constitutionally permissible. (Appendix, page 4a). The Court of Appeals implicitly conceded that, but for the dispositive weight given the statistical analysis (which, as urged in Petitioner's Petition for Rehearing by the Court In Banc, is nowhere relied upon in any of

the decisions of the Indiana courts), the discrimination prevailing under Indiana law would be constitutionally repugnant in that, absent such alleged rational classification, the denial of equal protection which does in fact occur would be impermissible.

Conflict With Applicable Decisions of This Court.

Subsequent to the decision of the United States Court of Appeals for the Seventh Circuit, Petitioner brought that Court's attention to this Court's decisions in *Glona* v. *American Guarantee and Liability Insurance Company* (1968), 391 U.S. 73 and *Levy* v. *Louisiana* (1968), 391 U.S. 68, decided last Term. Holding that application of the Louisiana Wrongful Death Act so as to discriminate against a decedent's illegitimate children runs afoul of the Equal Protection Clause, *Glona* and *Levy* clearly establish that the purported rational basis for a discriminatory classification, which in fact does deny equal protection of the laws, must rest upon sound policy and, even then, be framed so as to protect a legitimate *state* interest in remedying an evil of sufficient concern to justify the deprivation which results.

Petitioner respectfully submits that the purported reasons of policy relied upon by the Court of Appeals in this case, bottomed as they are in conjectural concern for an unclassified group of private individuals—civil tortfeasors —are not in any way a rational basis for the classification here involved, a classification that effectively and absolutely denies to all married women in the State of Indiana rights which continue to be fully granted to married men.

When it is observed that many administrative devices exist (*e.g.*, compulsive joinder of a wife's consortium claim with her injured husband's personal claim) which in the

workaday affairs of litigation successfully preclude any appreciable risk of "double recovery," it will be found that the supposed rationale for the rule here challenged can not survive a rigorous constitutional scrutiny of the kind this Court gave the discriminatory classification derived from the language of the Louisiana Wrongful Death Act.

Conflicts Among the Circuits.

The opinion of the United States of Appeals for the Seventh Circuit in this case is in conflict with the decision of the United States Court of Appeals for the Second Circuit in *Igneri* v. *Cie. de Transports Oceaniques* (2nd Cir., 1963), 323 F.2d 257. The result reached in *Igneri* was forced by *statutory* analysis, but it is clear that, following the landmark decision in *Hitaffer* v. *Argonne Co.* (D.C. Cir., 1950), 183 F.2d 811, *cert. den.,* 340 U.S. 852 (with which the Seventh Circuit's decision herein is also in fundamental conflict), the Second Circuit would have reached the opposite result in common law context. That decision necessarily would have rested upon equal protection grounds.

In the instant case there are no statutory obstacles. Indeed, if the law of the State of Indiana did not protect the consortium rights of a husband, this Petitioner's claims would not be of constitutional dimension. This is precisely why the Second Circuit found in *Igneri* that the wife of a longshoreman could not recover consortium damages: under the statutory structure, the husband of a longshorewoman would have had no such rights.

Likewise, it is apparent that the Indiana courts have formulated, and the Court of Appeals in this case has perpetuated, a discriminatory rule of law which the legislative authority of the state could not validly enact. Ob-

serving that Article I of the Constitution of Ohio is substantially identical to Article I, Section 23, of the Constitution of Indiana, we note the following definitive statement in *Leffler* v. *Wiley* (Ohio, 1968), 239 N.E.2d 235 at 236:

> If a statute were to affirmatively create such a right in a husband and yet deny it to a wife, such a classification based on sex alone would violate Article I of the Constitution of Ohio and the Fourteenth Amendment to the Constitution of the United States. The common-law distinction between husband and wife in regard to consortium is equally based upon an unreasonable, discredited concept of the subservience of the wife to her husband. The courts should not perpetuate in the common law a discrimination that could not constitutionally be created by statute.

Accordingly, the decision of the United States Court of Appeals for the Seventh Circuit in this case is in all significant ways in direct conflict with the decisions of the Second and District of Columbia Circuits.

The question here presented is an important question of federal law which has not been, but should be, explicitly settled by this Court. The decision of the United States Court of Appeals for the Seventh Circuit is in fundamental conflict with the applicable decisions of this Court in *Glona* v. *American Guarantee and Liability Insurance Company* and *Levy* v. *Louisiana.*

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Seventh Circuit entered herein on July 8, 1968, and adhered to on September 10, 1968, and that upon review said judgment be reversed and this cause be remanded to the United States District Court for the Southern District of Indi-

ana, Indianapolis Division, for disposition as the District Court may direct.

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APPENDIX

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

September Term, 1967 — April Session, 1968

No. 16482
Josephine Miskunas,
Plaintiff-Appellant,
v.
Union Carbide Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

July 8, 1968

Before MAJOR, *Senior Circuit Judge,* and SCHNACKENBERG and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In this diversity action, plaintiff sued to recover for damages resulting from injuries suffered by her husband, Edward Miskunas, on July 14, 1966. He was in one of defendant's buildings in Kokomo, Indiana, when a Model 20-20 Burton Mixer was being used to blend certain materials, resulting in an explosion that inflicted severe burns on Miskunas. As a result of his injuries, plaintiff was allegedly deprived of her husband's "society, services, companionship and consortium" for which she sought $200,000 in compensatory damages and $1,000,000 in exemplary and punitive damages.

Relying upon three Indiana cases,[1] the District Court held that under Indiana law a wife has no cause of action

[1] *Boden* v. *Del-Mar Garage,* 205 Ind. 59, 185 N.E. 860 (1933); *Brown* v. *Kistleman,* 177 Ind. 692, 98 N.E. 631 (1912); *Miller* v. *Sparks,* 136 Ind. App. 148, 189 N.E.2d 720 (1963).

for loss of her husband's services, companionship or consortium. Therefore, the defendant's motion to dismiss the complaint was granted.[2]

In *Boden* v. *Del-Mar Garage,* 205 Ind. 59, 185 N.E. 860, 863 (1933), the Supreme Court of Indiana stated that a husband cannot maintain a negligence action in that State for the loss of consortium unless connected with the loss of his wife's service, for the real basis of recovery is for the loss of her service. Under a 1950 Virginia statute, the Fourth Circuit has held that apart from mental anguish, a negligently injured wife can only recover for the tangible items of damage sustained by her. *Carey* v. *Foster,* 345 F. 2d 772 (4th Cir. 1965). Both cases recognize that a State may properly deny a spouse a recovery for intangible damages.

As recently as 1963, the Appellate Court of Indiana adhered to the rule that in that State a wife cannot sue a tort-feasor for loss of her husband's consortium. *Miller* v. *Sparks, supra,* note 1. Apparently the last time the question was directly before the Supreme Court of Indiana was in 1952 in *Burk* v. *Anderson,* 232 Ind. 77, 109 N.E. 2d 407. There it was decided that only the husband can sue for loss of consortial rights. Even though Judge Gilkison favored the rule that the consortium rights of each spouse are coextensive, a majority of the Supreme Court of Indiana refused to agree with his view. Twelve years later, the Indiana Supreme Court cited *Miller* v. *Sparks, Burk* v. *Anderson* and *Brown* v. *Kistleman, supra,* note 1, with approval, stating that " 'if the wife is permitted a separate recovery for her loss of consortium resulting from * * * injuries [to her husband], there is, in effect, a double recovery for

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[2] Unless she has a right to sue for loss of consortium, plaintiff does not dispute the District Court's holding that under *Boden* v. *Del-Mar Garage, supra,* note 1, she cannot state a cause of action for "mental anguish" without alleging that she suffered some physical injury. No such allegation is contained in the complaint.

the same matter'." *McDaniel* v. *McDaniel*, 245 Ind. 551, 558, 201 N.E. 2d 215 (1964).

Two states in this circuit have adopted the rule that the wife should be permitted to sue for loss of consortium.[3] Although this rule has much to commend it, we are bound by the unbroken line of Indiana authority to the contrary. *Seymour* v. *Union News Co.*, 217 F. 2d 168, 169 (7th Cir. 1954); *Sestito* v. *Knop*, 297 F. 2d 33, 34 (7th Cir. 1961). In accordance with the views of some of the Commentators, numerous jurisdictions continue to deny recovery to a wife. See *Igneri* v. *Cie. de Transports Oceaniques*, 323 F. 2d 257, 260-261 (2d Cir. 1963), certiorari denied, 376 U.S. 949. Therefore, we would not be warranted in speculating that the Indiana Supreme Court will allow a recovery by a wife for loss of consortium resulting from a negligent injury to her husband, when again presented with that question. Cf. *Hulburt Oil & Grease Company* v. *Hulburt Oil & Grease Company*, 371 F. 2d 251, 254-255 (7th Cir. 1966), certiorari denied, 386 U.S. 1032.

The plaintiff contends that the Indiana rule constitutes a violation of the Equal Protection clause of the Fourteenth Amendment to the Federal Constitution because it denies a wife a cause of action in a situation where a husband has one. This contention was successful in *Owen* v. *Illinois Banking Corp.*, 260 F. Supp. 820 (W.D. Mich. 1966), and *Karczewski* v. *Baltimore and Ohio Railroad Company*, 274 F. Supp. 169 (N.D. Ill. 1967), but unsuccessful in *Lunow* v. *Fairchance Lumber Company*, No. 66-122 Civil (W.D. Okla. 1967), affirmed on other grounds, 389 F. 2d 212 (10th

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[3] *Dini* v. *Naiditch*, 20 Ill.2d 406, 170 N.E.2d 881 (1960), and *Moran* v. *Quality Aluminum Casting Co.*, 34 Wis.2d 542, 150 N.W.2d 137 (1967). They followed the landmark decision of *Hitaffer* v. *Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950), certiorari denied, 340 U.S. 852.

Cir. 1968).[4] The Equal Protection clause does not ordinarily prevent a state from making a classification dependent upon one's sex. *Gruenwald* v. *Gardner,* 390 F. 2d 591 (2nd Cir. 1968). As Justice Frankfurter stated in upholding a Michigan law prohibiting women (with certain exceptions) from bartending:

> "The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, * * *. The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."
>
> *Goessaert* v. *Cleary,* 335 U.S. 464, 466.

Under the Equal Protection clause, a discriminatory rule of state law "will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U.S. 420, 426.

Because a husband can recover for lost earnings, Indiana could reasonably conclude that it would be undesirable to give the wife an action that might permit double recovery. Since 87.8% of married men are employed and only 34.4% of wives are employed,[5] Indiana could justifiably discriminate in this respect between the spouses. Indiana could infer that more often in a wife's suit than a husband's, the jury would award her duplicating damages for some of the

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[4] As the District Court pointed out in the *Lunow* case, "Nor can it be said in the light of the overall marriage relationship, the basic differences between the spouses and the different rights and responsibilities as between the spouses that invidious discrimination and an unreasonable classification is inherent in allowing the husband to recover for loss of consortium and recognize no such cause of action in the wife." (Memorandum opinion, p. 9.)

[5] These are the latest statistics available here and are for March 1964. U. S. Department of Labor, Bureau of Labor Statistics Reprint #2457.

same elements of injury. See Restatement of Torts, Section 695, Comment A. Allowing the husband to recover for the lost household services of the wife would not engender double recovery, for the wife cannot recover for those unpaid services. (If employed and injured, she can of course recover for her lost earnings.) As Judge Friendly pointed out in the *Igneri* case, *op. cit.* at p. 264, "it is doubted that the trial court's instructions and its own power, combined with that of the appellate Court * * * to review verdicts for excessiveness would suffice to remove the danger of double recovery." In criticizing the granting of a consortium action to the wife, Chief Justice Schaefer stated as follows in his dissenting opinion in *Dini* v. *Naiditch,* 20 Ill. 2d 406, 435, 170 N.E. 2d 881 (1960):

> "When two overlapping causes of action are made to grow where one has grown before, the possibility of double recovery is real. It cannot be obviated by the method suggested in the majority opinion [deducting from the computation of damages in the wife's consortium action any compensation given her husband in his action for the impairment of his ability to support], because there is no assurance that the wife's action will be tried first, or even that the two actions will be filed in the same court. A requirement of compulsory joinder of the two causes of action would help, but no such requirement exists."[6]

In view of the possibility of double recovery if the wife were given a consortium action, we must conclude that this case involves a permissible classification rather than an impermissible discrimination. *Krohn* v. *Richardson-Merrell, Inc.,* 406 S.W. 2d 166, 168, 169 (Tenn. Sup. Ct. 1966), certiorari denied, 386 U.S. 970; *Seagraves* v. *Legg,* 147 W. Va. 331, 127 S.E. 2d 605, 608 (1962). All federal courts

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[6] On the other hand, the *Hitaffer* and *Karczewski* opinions, *supra,* express the view that double recovery can be avoided by deducting from the wife's damages any amount recovered by the husband for loss of earning power. See 183 F.2d at p. 819 and 274 F.Supp. at p. 173.

of appeals that have considered the subject have denied consortium rights where that is the *lex loci fori*. *Carey* v. *Foster*, 345 F. 2d 772 (4th Cir. 1965); *Igneri* v. *Cie. de Transports Oceaniques*, 323 F. 2d 257 (2d Cir. 1963; state law considered in determining maritime law), certiorari denied, 376 U.S. 949; *Criqui* v. *Blaw-Knox Corporation*, 318 F. 2d 811 (10th Cir. 1963); *Sestito* v. *Knop*, 297 F. 2d 33 (7th Cir. 1961); *Filice* v. *United States*, 217 F. 2d 515 (9th Cir. 1954); *O'Neil* v. *United States*, 202 F. 2d 366 (D.C. Cir. 1953);[7] *Werthan Bag Corp.* v. *Agnew*, 202 F. 2d 119

While we would prefer to accord the wife a consortium cause of action, it is for the Indiana legislature or judiciary to decide whether to recognize this emerging tort. It is unfitting for us to interfere in such a question of State policy under the guise of the Equal Protection clause.

The judgment of the District Court is affirmed.

SCHNACKENBERG, *Circuit Judge*, dissenting.

Josephine Miskunas, plaintiff, has appealed from a final judgment of the district court dismissing her action for loss of consortium. The action is for damages to her marriage resulting from injuries to her husband which she alleges deprived her of his "society, services, companionship and consortium". The district court held that under Indiana law a wife cannot maintain an action for loss of her husband's society, companionship, affection and conjugal relationship occasioned by personal injuries to her husband. In the district court and on appeal plaintiff has argued that that application of Indiana law, resulting in a dis-

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[7] In *O'Neil*, decided just 3 years after its *Hitaffer* case that gave the wife an action for loss of consortium in the District of Columbia, the Court of Appeals followed Maryland law in denying the wife such an action. This indicates that *Hitaffer* was not based on the Equal Protection clause. (6th Cir. 1953). We decline to depart from this impressive array of modern authority.

missal of her complaint, violates the fourteenth amendment to the federal constitution by denying her equal protection of the law, since a husband may pursue such a remedy under Indiana law. Contrary to the view of the majority herein, I would hold that such application of the Indiana law by the district court denies plaintiff the equal protection of the law, in violation of the fourteenth amendment to the federal constitution.

1. Consortium means, *inter alia,* the marital association of husband and wife. Since the wife was considered a chattel of her husband at common law and he entitled to her services, the term connotes in addition to the right of companionship, cooperation, affection and aid, the husband's right to a wife's services, *i.e.* her wifely services. However, society since has removed the wife's disabilities existent at common law and now considers the wife a citizen equal with her husband. Indiana has in fact "emancipated" the married woman by enactment of various statutes relating to her property, services, ability to sue and to be sued, etc. (Burns Ind. Stat. ch. 38 §§ 101 to 126).

2. While the majority correctly recognizes some prevailing limitations relating specifically to women, *enacted* by the state, which deal with a woman's economic pursuits, *viz.,* hours and types of employment, see *Goesaert* v. *Cleary,* 335 U.S. 464 (1948) and *Muller* v. *Oregon,* 208 U.S. 412 (1908), the Indiana courts remain closed to a woman who seeks damages for a wrong to her, caused by the negligence of a third person which results in injury to her husband. Contrary to the fact in *Goesaert* v. *Cleary, supra,* Indiana has *enacted no statute* barring to a wife the remedy sought by plaintiff here. Involved is a court's reclassification *by sex* of a citizen's civil rights to remedy a wrong to her interests—followed by its extinction by *judicial fiat,* repugnant to constitutional principles.

Thus, in *Brown* v. *Kistleman,* 177 Ind. 692, 98 N.E. 637 (1912), the Indiana Supreme Court adopted the reasoning that, since the husband could not recover for his wife's personal damages and for his loss of consortium at com-

mon law, a wife has no cause of action or loss of consortium today. The fallacy, apparent from the opinion and now perpetuated by that court, is that at common law a wife's action for personal damages did not exist. The value of a wife to her husband was exactly her ability to earn money and render services and be helpful to others, *viz.*, his consortium. Thus we find, at 696-697:

> "The actions by husbands at common law for expenses and loss of services, in which the loss of consortium has been considered in estimating damages, were all in cases in which no damages could be awarded for loss of the ability to earn money and render services and be helpful to others, in an action by the husband and wife for the wife's personal damages, because at common law all these elements of damage belonged to the husband. * * * There was not an allowance to the wife for her loss of ability to earn wages and render services, and at the same time an allowance to the husband, in the form of compensation for the loss of consortium for the same diminution of ability to be helpful. * * * When the injury is to the person of another, the impairment of ability to work and be helpful and render services of any kind is paid for in full to the person injured."

However, the husband is permitted now to recover for loss of consortium based upon loss of "wifely" services and the wife is permitted to recover for injury to her person for the same tort. *Burk* v. *Anderson,* 232 Ind. 77, 109 N.E. 2d 407 (1952); Cf. *Ohio and Mississippi Ry. Co.* v. *Cosby, et al.,* 107 Ind. 32, 7 N.E. 373 (1886); and *P. B. Arnold Co.* v. *Buchanan,* 60 Ind. App. 626, 111 N.E. 204 (1916). In spite of this fact, where the husband is negligently injured, the wife is barred from recovery for her loss of consortium. *Boden* v. *Del-Mar Garage,* 205 Ind. 59, 185 N.E. 860 (1933). In *Boden,* the Indiana court rejected the wife's argument that the husband had an independent right of action for loss of consortium unconnected with the loss of service. At 863, it stated:

"Upon an exhaustive examination of cases in many jurisdictions we find that, wherever the husband has brought an action for damages on account of injuries to his wife by the negligence of a third party to recover for loss of service, companionship, and society of his wife, the gist of the action, and the real basis of recovery, is for the loss of service, and not the loss of consortium."

Obviously, if an action for loss of consortium may be maintained by a husband by alleging wifely services, a wife is denied equal protection of the law if she is denied the corresponding services due her as a result of coverture. The opinion in *Hitaffer* v. *Argonne Co.*, D.C. Cir., 183 F. 2d 811 (1950),[1] holding that a wife has a cause of action for loss of consortium due to a negligent injury to her husband, demonstrates this inequity, at 819:

"• • • logic, reason and right are in favor of the position we are now taking. The medieval concepts of the marriage relation to which other jurisdictions have reverted in order to reach the results which have been handed to us as evidence of the law have long since ceased to have any meaning. It can hardly be said that a wife has less of an interest in the marriage relation than does the husband or in these modern times that a husband renders services of such a different character to the family and household that they must be measured by a standard of such uncertainty that the law cannot estimate any loss thereof. The husband owes the same degree of love, affection, felicity, etc., to the wife as she to him."

---

[1] *Hitaffer* was overruled by the same court only with respect to its interpretation of the exclusivity of the remedy provided by § 5 of the Longshoremen and Harbor Workers Act—33 U.S.C. § 905. See *Smither and Company, Inc.* v. *Coles*, D.C. Cir., 242 F.2d 220 (1957), cert. den. 354 U. S. 914 (1957). Thus the relevance of *Hitaffer* to the case at bar remains unimpaired.

Relevant comments with respect to Indiana law on this subject were made by Judge Marovitz in the recent case of *Karczewski* v. *Baltimore and Ohio Railroad Co.* (D.C. N.D. Ill., 1967), 274 F. Supp. 169. At 179-180, the court concluded:

> "We believe that the instant classification by sex certainly is unrelated to any of the concerns which could motivate a distinction on that basis. As we have indicated, the intangible segments of the elements comprising the cause of action for loss of consortium are equally precious to both husband and wife. Certainly, no justification is apparent, or is offered, to affirmatively support the classification. We think, therefore, that it discriminates unreasonably and arbitrarily against women, and must be abolished.
>
> "It is not relevant to say that because all wives are similarly situated all are equally protected. For that is to ill-define the relevant classification. In these circumstances, all married people, husbands *and* wives, must comprise the class to be protected. That is because each has an equal interest in the elements of the marital relationship which are protected by the action for loss of consortium. To deny it to wives is a classification without reason, is arbitrary, and is consequently a violation of the Equal Protection Clause of the Fourteenth Amendment."

See also to the same effect, *Owen* v. *Illinois Baking Corp.* (W.D. Mich. 1966), 260 F. Supp. 820, similarly involving the Indiana law with respect to a wife's loss of consortium. To the same effect is the recent decision of the New York Court of Appeals in *Millington* v. *Southeastern Elevator Company, et al.*, case No. 169,[2] where Judge Keating said:

> "* * * the mental and emotional anguish caused by seeing a healthy, loving companionable mate turned into a shell of a person is real enough. * * * The loss of com-

[2] Not yet reported.

panionship, emotional support, love, felicity and sexual relations are real injuries. The trauma of having to care for a permanent invalid is known to have caused mental illness. There may not be a deterioration in the marital relationship, but it will certainly alter it in a tragic way. * * *"

The acceptance of this view is further indicated by the April 2, 1968 decision of the Court of Appeals of Franklin County, Ohio, Case No. 8933, *Leffler* v. *Wiley*,[3] disposing of the appeal of Mrs. Leffler who had joined with her husband in a suit for damages. The trial court held that, although a husband can recover for the loss of his wife's services and consortium, yet a wife cannot recover for the loss of her husband's loss of services and consortium. On appeal she contended that this action deprived her of equal protection of the laws.

In the *Leffler* opinion, it was said:

"* * * However, regardless of whether it be incidental or independent, the common law of Ohio does recognize loss of consortium as an item of damages recoverable by a husband.

"If a statute were to affirmatively create such a right in a husband and yet deny it to a wife, such a classification based on sex alone would violate * * * the Fourteenth Amendment to the Constitution of the United States. The common-law distinction between husband and wife in regard to consortium is equally based upon an unreasonable, discredited concept of the subservience of the wife to her husband. *The courts should not perpetuate in the common law a discrimination that could not constitutionally be created by a statute.* [Italics supplied.]

"In our opinion, loss of consortium is an item of damage to a wife exactly to the same extent as to the husband. We hold that her legal rights to recover are

[3] Not yet reported.

equal to those of her husband. The demurrer should have been overruled.

"The judgment of the Common Pleas Court will be reversed and the cause remanded for further proceedings."

In view of Indiana's patent discrimination, it was error for the district court in the case at bar to dismiss plaintiff's complaint. I can find no justification in reason or law for this unjust result. Accordingly, I would reverse the judgment of the district court, and grant plaintiff a trial upon the merits of her complaint.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, September 10, 1968

Before

Hon. Latham Castle, Chief Judge
Hon. J. Earl Major, Sr. Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. John S. Hastings, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Otto Kerner, Circuit Judge

Josephine Miskunas Plaintiff-Appellant No. 16482 vs. Union Carbide Corporation, a New York Corporation Defendant-Appellee	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

It Is Ordered by the Court, En Banc, that the petition for rehearing en banc in this cause be and the same is hereby denied.

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 811

JOSEPHINE MISKUNAS,
Petitioner,

vs.

UNION CARBIDE CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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JOSEPHINE MISKUNAS,

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JURISDICTION OF THIS COURT.

Petitioner's jurisdictional statement (Pet. 2) represents that this case presents jurisdictional reasons within the ambit of Rule 19(b). Respondent denies that any legitimate jurisdictional reason exists which would justify granting the petition. Respondent's analysis in this regard is hereinafter set forth.

QUESTION PRESENTED FOR REVIEW.

Ordinarily, a petitioner's statement of the Question Presented for Review can be said to fairly frame the issue involved. Such is not true in the instant case where Petitioner has loaded the question and framed it in such a way as to be misleading and prejudicial to the Respondent.

Specifically, the Question Presented for Review by

Petitioner assumes that her claim in this case is identical to that which her husband would have under Indiana law had she been injured and that the word "consortium" is a generic term with but one meaning under Indiana law for both husband and wife. Respondent denies that these are valid or legitimate assumptions.

Petitioner's claim in the United States District Court (in four paragraphs, each with a differing theory of liability) sought damages on the alleged basis that she had been "deprived of the society, services, companionship and consortium of her husband." (Pet. App. 1a) The United States District Court dismissed the claim on the basis that the substantive common law of the State of Indiana did not recognize any such cause of action. The United States Court of Appeals for the 7th Circuit affirmed that dismissal and assumed, without deciding, that the respective claims of a husband and wife for so-called loss of "consortium" arising from an injury to the other were identical.

It is therefore submitted that the only proper question which can be submitted is:

> Does the equal protection clause of the Fourteenth Amendment of the United States Constitution prohibit the United States Court of Appeals for the 7th Circuit from enforcing the substantive common law of Indiana which denies a wife the right to recover damages for loss of the society, services, companionship and consortium of her husband who is injured in an accident?

CONSTITUTIONAL PROVISIONS INVOLVED.

Under this heading, Petitioner sets forth the language of the Fifth Amendment to the United States Constitution as well as that of the Fourteenth. Nothing else is said in the Petition in respect to the Fifth Amendment other than quoting it under this heading. It must, therefore, be concluded that Petitioner has abandoned any claim that the Fifth Amendment is in any way involved in this matter.

THERE IS NO REASON TO ALLOW THE WRIT.

Husband and Wife Rights Are Not Reciprocal Under Indiana Law.

This case is bottomed on facts which, under the doctrine of *Erie Railroad Company* v. *Tompkins* (1937), 304 U. S. 64, 82 L. Ed. 1188, required that the District Court and the Court of Appeals apply the substantive common law of the State of Indiana to determine whether or not Petitioner presented a claim upon which relief could be granted. That question was resolved adversely to Petitioner in both the District Court and Court of Appeals. It is, indeed, clear beyond any question or argument that the common law of the State of Indiana does not recognize any claim in a married woman for loss of her husband's "society, services, companionship and consortium" occasioned by a negligent injury to him.

Brown v. *Kistleman* (1912), 177 Ind. 692, 98 N. E. 637.

Boden v. *Del-Mar Garage* (1932), 205 Ind. 59, 185 N. E. 860.

Burk v. *Anderson* (1952), 232 Ind. 77, 109 N. E. 2d 407.

McDaniel v. *McDaniel* (1964), 245 Ind. 551, 201 N. E. 2d 215.

Petitioner represents to this Court that "Throughout the litigation the parties have agreed that the substantive law of the State of Indiana protects a husband's counterpart rights in respect to recovery of damages for loss of his wife's consortium." (Pet. 6) This is inaccurate and misleading because at all times, it has been Respondent's contention that the common law of the State of Indiana does not give to the husband a claim which is identical to that which is denied to his wife. The Court of Appeals did

not, as Petitioner suggests, resolve this question in Petitioner's favor. That Court simply assumed without any analysis or argument that the claims of a husband and a wife were co-extensive, probably because it considered the constitutional argument presented by Petitioner without substance. Of course, the identity of the claims must be Petitioner's foundation premise because, as Petitioner says, "If the law of the State of Indiana did not protect the consortium rights of the husband, this Petitioner's claims would not be of constitutional dimension." (Pet. 8)

That the rights of a husband and wife are not fully reciprocal under Indiana law is not open to legitimate debate. Thus, a husband has the obligation to support his wife, but she has no such obligation to support him. As the Indiana Supreme Court said in *Supreme Council, etc.* v. *Grove* (1911), 176 Ind. 357, 369, 96 N. E. 159, 164, wherein a fraternal benefit association claimed the wife of a disabled member had an obligation to care for and support him:

> "We have no statute requiring a married woman to support her husband, and the common law does not require to do so. It does require him to support her."

A husband, likewise, is liable for medical expenses of his wife, but she is not responsible for his. So, when a wife is tortiously injured, the husband is damaged to the extent of these medical expenses, but when he himself is so injured, the wife is not similarly damaged. On this basis alone, therefore, a husband has a cause of action against the tort feasor while his wife would not have a corresponding action.

Historically the same principle applied to a wife's business earnings, but that has been made obsolete by statute. *Burns Ind. Stat. Anno.* § 38-103. This statute, however, does not affect the wife's obligation to serve her family and

husband. So, when the wife is tortiously injured and is unable to perform those services, the husband is damaged and is given a cause of action for loss of those services. Conversely, however, the wife has no cause of action for loss of her husband's family services and support. That is considered damage to the husband. Thus, under Indiana law, a husband has the sole right to recover for his impaired earning capacity and loss of earnings, both past and prospective. As it is said in *Brown* v. *Kistleman* (1912), 177 Ind. 692, 98 N. E. 637:

> "A wife has no cause of action against a third person for damages for negligent injuries to her husband, resulting in the diminution of his earning capacity and his consequent ability comfortably to support and maintain her, because the husband is entitled, in a proper action, to full compensation for such loss." (177 Ind. 693.)

Moreover, under Indiana common law, a husband has no cause of action as such for loss of companionship and society of his wife. Such claim must involve the element of loss of her services. As was said in *Boden* v. *Del-Mar Garage* (1932), 205 Ind. 59, 185 N. E. 860, the Court stated:

> "Upon an exhaustive examination of cases in many jurisdictions we find that wherever the husband has brought an action for damages on account of injuries to his wife by the negligence of a third party to recover for loss of service, companionship and society of his wife, the gist of the action, and the real basis of recovery, is for the loss of service, and not the loss of consortium. We have been unable to find any case in this state which holds that the husband may maintain an action growing out of an injury for the loss of consortium alone and unconnected with the loss of service; neither have we found any case where the wife may maintain such an action where it grew out of an injury caused by negligence to the husband." (205 Ind. 69.)

In other words, under the Indiana common law, the essential and critical element of a husband's action for "loss of consortium" is loss of his wife's services. On the other hand, a wife, under Indiana common law, cannot recover for loss of her husband's service by reason of injuries to his person because the Indiana courts have given that right of recovery to the husband. Consequently, the claim which the Plaintiff here seeks to maintain involves only the intangible, etherial, and purely personal relationships of her marriage and is different from that which Indiana law gives to her husband. Whatever other states may say about the meaning of "loss of consortium", the Indiana courts have defined the essential elements of recovery such that the claim of Plaintiff here for loss of "society, services, companionship and consortium" is not the same as the claim of her husband, bottomed as it is on the loss of services and expense.

Finally, it is crystal clear that under Indiana law, in the absence of statute, husband and wife are an entity in all situations so that the husband, under that law, would recover for any injury to the marriage relationship itself. Herein lies the real fallacy of the Petitioner's argument and the dissent of Judge Schnackenberg in the Court of Appeals—both assume that the different approach to husband and wife injuries under Indiana law is premised upon the disability of the wife rather than upon the entity theory of husband and wife. That Indiana follows the entity theory is made clear by the recent case of *Hannah* v. *Hannah* (1968), 15 Ind. Dec. 682, 241 N. E. 2d 376, wherein a husband sued his wife for injuries occasioned by her negligent operation of an automobile. The trial court sustained the husband's motion for summary judgment upon the theory that the doctrine of interspousal immunity for negligent tort was a part of the Indiana common law. In affirming it was held:

"This court believes that the trial court was correct in sustaining appellee's motion for summary judgment. Our affirmance of this result is founded upon the sound reasoning of our courts first enunciated and subsequently adopted in this jurisdiction without interruption since 1885 in that Indiana adheres to the common law theory and, thus, does not allow an individual to sue his spouse in an action resulting from a negligent tort. Our Supreme Court in *Barnett* v. *Harshbarger* (1886), 105 Ind. 410 [5 N. E. 718], provided the initial interpretation:

> 'The rule of the common law proceeds upon the theory that in legal contemplation the husband and wife are one person, *and not upon the theory that the wife is under a legal disability.* This is unquestionably the common law, and that is a part of the law of the State, so that it still prevails unless abrogated either by the express words of the statute or by necessary implication.' (Emphasis supplied.)

"Our General Assembly modified the common law legal relationship between husband and wife with the enactment of the Married Woman's Acts, Burns' Ind. Stat., § 38-101—38-126, which now provide certain independent rights and disabilities as between spouses. The General Assembly, however, did not enact a statutory provision specifically stating that one spouse may sue another spouse for a negligent tort. The absence of any explicit statutory authority coupled with our long standing adherence to the common law precludes recovery in the case at bar. Indiana has, in fact, provided definite statutory exceptions which have abrogated various common law principles of the husband-wife relationship, but in the absence of such statutory authority, this court is required to consider the husband and wife an entity in all remaining situations.

"Our court has previously stated this rule in the case of *Hary* v. *Arney* (1957), 128 Ind. App. 174, 145 N. E. 2d 575, wherein the court stated:

> 'It is well settled in this State that the Married Woman's Acts have not abrogated the common law

> rule that marriage extinguishes all rights of action in favor of his wife against her husband. *Henneger* v. *Lomas* (1896), 145 Ind. 587, 44 N. E. 462; *Blickenstaff* v. *Blickenstaff* (1929), 89 Ind. App. 529, 167 N. E. 476; *Hunter* v. *Livingston* (1955), 125 Ind. App. 422, 123 N. E. 2d 912 (transfer denied).'
>
> "The General Assembly in its wisdom has enacted certain statutes bearing on the husband-wife relationship, and, had our General Assembly desired to provide a remedy to a spouse when injured by the tortious act of a negligent spouse, it would have expressly done so. Further, this court believes that there is no provision within the statute so indefinite as to permit a contrary result based upon necessary implication or statutory interpretation."

In other words, if there is any interference in the marriage relationship occasioned by negligent injuries to the husband, he has the right to recover the damages for such interference and not his wife.

There Is No Important Question of Federal Law.

Petitioner's claim that an important question of federal law is here involved derives from the erroneous and unsupportable premise that Petitioner's claim is identical to that which her husband would have under Indiana law had she been injured. It is solely from this fallacious premise that Petitioner argues that to deny her claim would deny her equal protection of the laws under the Fourteenth Amendment of the United States Constutution. Inasmuch as it has just been demonstrated that the claims of Petitioner and her husband had she been injured are not identical, there is no legitimate constitutional issue at all.

Even if it is assumed—as did the Court of Appeals—that the claims of Petitioner and her husband for so-called "loss of consortium" are identical, the denial of Peti-

tioner's claim here is not violative of the equal protection clause and "will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland* (1961), 366 U. S. 420, 426, 6 L. Ed. 2d 393, 399. Moreover, when a classification is called into question under the equal protection clause, ". . . if any state of facts reasonably can be conceived that would sustain it, the existence of such state of facts must be assumed." *Morey* v. *Doud* (1957), 354 U. S. 457, 464, 1 L. Ed. 1485, 1490.

There are cogent and compelling reasons under Indiana law why the Indiana common law denies a wife any cause of action for so-called loss of "society, services, companionship and consortium of her husband."

Initially, as the opinion of the Court of Appeals correctly points out (Pet. App. 4(a), 5(a)), there is a very real likelihood that there would be a double recovery. As is pointed out in *Igneri* v. *Cite de Transports Oceaniques* (2nd Cir., 1963), 323 F. 2d 257, 264:

> ". . . it is doubted that the trial court's instructions and its own power, combined with that of the appellate court . . . to review verdicts for excessiveness would suffice to remove the danger of double recovery."

Furthermore, as observed by Chief Justice Schaefer in his dissenting opinion in *Dini* v. *Naiditch* (1960), 20 Ill. 2d 406, 435, 170 N. E. 2d 881, 895:

> "When two overlapping causes of action are made to grow where one has grown before, the possibility of double recovery is real. It cannot be obviated by the method suggested in the majority opinion [deducting from the computation of damages in the wife's consortium action any compensation given her husband in his action for the impairment of his ability to support], because there is no assurance that the wife's action will be tried first, or even that the two actions will be filed in the same court. A requirement of compulsory joinder of the two causes of action would help, but no such requirement exists."

Petitioner's suggestion (Pet. 7, 8) that there are many administrative devices to preclude a potential double recovery is just not true. There is no compulsory joinder in the State of Indiana and no way to prevent either the husband's case or the wife's case from being tried in Indiana courts and the other in the Federal system. There is, furthermore, no assurance that Petitioner's claim here will be tried prior to that of her husband so as to provide an opportunity for deducting the damages from any recovery by her husband and no way to determine precisely what those damages may have been if recovered with other damages in the wife's case. In other words, there is no machinery whatsoever presently existing under Indiana law to prevent the double recovery. Prevention of double recovery is a legitimate, sensible reason of itself to justify denying Petitioner's claim.

Secondly, and perhaps most importantly, it is most rational and sensible that the Indiana common law has chosen to classify a wife in a position similar to that of her children so far as the claim in question is concerned. That is to say, when a father is injured, his children suffer the identical loss of society, affection, companionship, etc. that is suffered by the wife. The only possible difference in the loss is the possible interference with the sexual relationship, which interference is compensable in the husband's action in any event. No state, in the absence of statute, has ever given a child a cause of action for damages occasioned by this type of loss or interference—and it cannot be seriously contended that there is any constitutional infirmity in that result.

Marriage and family are institutions of the state, and it is therefore most reasonable that a state, through its common law, should classify a mother and child similarly rather than stretch the equation of man and woman and perhaps open the door to other peripheral claims. This is

perhaps why this court denied a petition for writ of certiorari in *Krohn* v. *Richardson-Merrell, Inc.* (1966), 219 Tenn. 37, 406 S. W. 2d 166, cert. den. (1967) 386 U. S. 978, 18 L. Ed. 129, where the Supreme Court of Tennessee held:

> "Assuming, but not deciding, that the Fourteenth Amendment to the United States Constitution would ever rightly come into play in a case such as that presented by this record, it is our view that many and obvious differences between what, by legal logic, is recoverable by the male spouse for injury, on the one hand, and the female spouse on the other, may be conceived of. In short, under this view, the Tennessee rule with respect to recovery for loss of consortium does not work a 'discrimination' but no more than a practical and logical classification." (406 S. W. 2d 168, 169.)

See also *Seagraves* v. *Legg* (1962), 147 W. Va. 331, 127 S. E. 2d 605, where the Supreme Court of West Virginia denied that there was any substance to the equal protection argument here advanced by plaintiff.

Again, as the District Court said in *Lunow* v. *Fairchance Lumber Co.*, No. 66-122 Civil (W. D. Okla., 1967) affirmed on other grounds, 389 F. 2d 212 (10th Cir., 1968):

> "Nor can it be said in the light of the overall marriage relationship, the basic differences between the spouses and the different rights and responsibilities as between the spouses that invidious discrimination and an unreasonable classification is inherent in allowing the husband to recover for loss of consortium and recognize no such cause of action in the wife." (Memorandum Opinion, p. 9.)

Thirdly, to deny the Petitioner in this case a cause of action for her so-called loss of consortium permits Indiana, in the words of Judge Friendly in *Igneri* v. *Cie de Transports Oceaniques* (2nd Cir., 1963), 323 F. 2d 257, 267:

> ". . . to avoid conspicuous differences in treatment between similarly situated persons."

That is, under Indiana law, a wife is denied recovery against her husband's employer for so-called loss of consortium when her husband is injured in an accident which is compensable under the Indiana Workman's Compensation Act. *Burns Ind. An. Stat.*, § 40-1206; *Stainbrook* v. *Johnson County Farm Bureau Co-Op. Assn.* (1954), 125 Ind. App. 487, 122 N. E. 2d 884. Consequently, rather than producing a discrimination, the Indiana common law which denies the existence of a cause of action such as is asserted here by Petitioner produces a harmony and a most logical classification of all wives which avoids the caprice of whether the injury is work connected or not.

Finally, under a long line of authorities emanating from this court, sex alone represents a rational basis for distinction and the equal protection clause does not ordinarily prevent a state from making a classification dependent upon one's sex. As Justice Frankfurter stated in *Goesaert* v. *Cleary* (1948), 335 U. S. 464, 93 L. Ed. 163, upholding a Michigan statute prohibiting women (with certain exceptions) from bartending:

> "The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes . . . The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." (335 U. S. 464, 466.)

There Is No Conflict With Decisions of This Court.

Petitioner suggests as a further purported basis of jurisdiction in this case that the judgment of the Court of Appeals herein in some way conflicts with the decisions of this Court in *Glona* v. *American Guaranty & Liability Insurance Company* (1968), 391 U. S. 73, 20 L. Ed. 2d 441 and *Levy*

v. *Louisiana* (1968), 391 U. S. 68, 20 L. Ed. 436. Just how this conflict exists is nowhere explained by Petitioner. This omission undoubtedly results from the fact that there clearly is no conflict.

The *Levy* and *Glona* cases involved the interpretation and constitutionality of a Louisiana wrongful death statute. The statute, as interpreted by the Louisiana courts, gave both legitimate and acknowledged illegitimate children a cause of action for wrongful death of either parent, but denied such a cause of action to illegitimate children. The statute also gave a mother a cause of action for wrongful death of both her legitimate and acknowledged illegitimate children, but denied her a cause of action for the wrongful death of her illegitimate but unacknowledged children. *Levy* involved the former aspect of the statute and *Glona* involved the latter. The avowed historical purpose of this distinction between legitimate and illegitimate children, and the only reason discussed for such distinction, was inhibiting the cause of illegitimacy. A majority of this court held that it could not find any rational basis for assuming a causal connection between "sin" and the distinction made by the statute as interpreted. It was concluded, therefore, that the statute was unconstitutional as a denial of equal protection of the law insofar as it distinguished between legitimate and illegitimate children.

Even if one disagrees with the majority opinion in these cases, one can hardly quarrel with the proposition that Louisiana's interest in preventing illegitimacy is, at best, only tenuously served by giving a cause of action to a legitimate child, but denying it to his illegitimate brother or sister. However, as has been previously pointed out, there are a number of sound and meaningful reasons why Indiana does not recognize the cause of action here asserted by Petitioner. Indeed, if the Indiana common law produced any other result, the rationale of *Levy* and *Glona* would

encourage and foster peripheral and perhaps fraudulent claims and would, under the guide of equal protection, effectively destroy Indiana's ability to continue its abolition of the common law marriage and the adulterous relationship. In other words, if, in the cause of "equal protection", this court holds that Indiana must give a cause of action to a legitimately married woman merely for loss of society, companionship and the sexual relationship of her husband, there is no justifiable reason why a cause of action for that same interference should not be given to a mistress or to any unmarried female who can establish an appropriate living relationship with a man. Such a result is totally offensive and certainly not a result which the equal protection clause of the Fourteenth Amendment contemplates or requires.

The decisions of this court in *Levy* and *Glona* in no way conflict with the decision of the United States Court of Appeals for the 7th Circuit. They simply point out that there must be a reasonable basis for the classification and there are many such reasonable bases for the classification accomplished in this case.

There Is No Conflict Among the Circuits.

Petitioner claims that the judgment of the Court of Appeals in some unspecified way conflicts with the decisions of the Second Circuit in *Igneri* v. *Cie de Transports Oceaniques, supra,* and the District of Columbia Circuit in *Hitaffer* v. *Argonne Co.* (D. C. Cir., 1950), 183 F. 2d 811, cert. den., 340 U. S. 852, 95 L. Ed. 624.

There is no conflict between these decisions and the decision of the Court of Appeals in this case.

The *Hitaffer* case held that under District of Columbia law, a wife has a cause of action for so-called loss of consortium resulting from a negligent injury to her husband.

This alone distiguishes it. It also held that such action was not barred by the Longshoreman and Harbour Worker's Compensation Act. (This portion of the holding was subsequently overruled in the case of *Smither & Co., Inc.* v. *Coles* (D.C. Cir., 1957), 242 F. 2d 220, cert. den. 354 U. S. 914, 1 L. Ed. 2d 1429.) The *Hitaffer* decision in no way involved the question of whether or not the equal protection clause of the Fourteenth Amendment would be violated by denying the wife a cause of action since it was held that the wife as a matter of substantive law had such an action.

The *Igneri* case held that the wife of a longshoreman could not recover for so-called loss of her husband's consortium occasioned by the negligence of the shipowner or the unseaworthiness of the ship. The court rendered its decision on the basis of its interpretation of the statute, and it had nothing to do with constitutional grounds.

Neither *Igneri* nor *Hitaffer* constitutes any conflict with the decision of the United States Court of Appeals for the 7th Circuit in this case. To suggest to the contrary is to either completely misread those opinions or to misrepresent the nature of these cases to this Court.

CONCLUSION.

This was a case in which the Petitioner utilized the federal forum to circumvent the clearly established and sound common law in the State of Indiana. She initially tried to convince both the District Court and the Court of Appeals that Indiana law permitted her to recover. Failing that argument, she then asserted that the denial of her claim violated the equal protection clause of the Fourteenth Amendment and sought to have the Court of Appeals interfere in a question of state policy under the guise of "equal protection." Of course, had she chosen to do so, Petitioner

could have litigated her contentions in the State Courts of Indiana.

As it has been pointed out, there is no important question of federal law here involved for the reason that the rights of a husband and a wife are not fully reciprocal, either as between themselves or as to third parties. The Court of Appeals in this case did not decide a federal question in conflict with any applicable decision of this Court, and its opinion in this case is not in conflict with the decision of any other Court of Appeals on the same matter. These being the only basis for jurisdiction, and having not been met, we respectfully submit that the writ should not be granted.

Respectfully submitted,

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